DAHLSTROM LUMBER CO.
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS
and
MAYR BROTHERS LOGGING CO., INC., ET AL.
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-75-A, 90-78-A Decided July 17, 1991

Consolidated appeals from the approval of Final Operating Instructions for the Sale of Timber Within the North Boundary Addition, Quinault Indian Reservation.

Affirmed in part; vacated in part; remanded.

1. Indians: Generally--Statutory Construction: Indians

Doubtful or ambiguous expressions in statutes enacted for the benefit of Indians must be interpreted in favor of the Indians.

2. Indians: Lands: Generally--Indians: Trust Responsibility

Public Law 100-638, 102 Stat. 3327, imposes a trust responsibility on the Bureau of Indian Affairs in its administration of lands transferred to the Quinault Indian Nation by that act.

3. Indians: Generally--Statutory Construction: Administrative Construction

In interpreting a statute that attempts to address two conflicting Federal policies, the Bureau of Indian Affairs must be cognizant of the inherent tension within the statute.

APPEARANCES: Michael A. McKean, Esq., Gig Harbor, Washington, for Dalhstrom Lumber Company; Gregory J. Miner, Esq., and Patricia K. Bailie, Esq., Portland, Oregon, for Mayr Brothers Logging Co., Inc., J & J Shake, Inc., and North Shore Veneer, Inc.; Michael E. Drais, Esq., Office of the Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Portland Area Director; and Amy L. Crewdson, Esq., Taholah, Washington, for the Quinault Indian Nation.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appeals were filed with the Board of Indian Appeals (Board) by Dalhstrom Lumber Company and by Mayr Brothers Logging Company Inc., J & J Shake, Inc., and North Shore Veneer, Inc. (appellants). Both appeals seek review of the Final Operating Instructions for the Sale of Timber Within the North Boundary Addition, Quinault Indian Reservation (operating instructions), which were approved on March 9, 1990, by the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA). The appeals were consolidated by Board order dated May 14, 1990. For the reasons discussed below, the Board affirms the operating instructions in part, vacates them in part, and remands this matter for revision of the operating instructions in accordance with this opinion.

Background

The Quinault Indian Reservation (reservation) was established on the Olympic Peninsula in western Washington by an Executive Order issued by President Ulysses S. Grant on November 4, 1873. Parts of the area encompassed within the reservation were not surveyed until 1892. Because of an inaccuracy in the survey, approximately 15,000 acres along the northern boundary were improperly excluded from, the reservation. See Quinaielt Tribe v. United States, 118 Ct. Cl. 220 (1951); 102 Ct. Cl. 822 (1945).

In 1897, pursuant to section 24 of the Act of March 3, 1891, 26 Stat. 1099, 1103, President Grover T. Cleveland set aside a large tract of forest land adjacent to the reservation. This tract later became the Olympic National Forest. Part of the boundary for the forest tract was stated to be the "North boundary of the Quinault Reservation." Lands that should have been included within the reservation thus became part of the Olympic National Forest.

The Olympic National Park was established by the Act of June 29, 1938, 52 Stat. 1241, 16 U.S.C. § 251. Part of the land for the park was taken from the Olympic National Forest and included acreage that should have been included in the reservation as established by the Executive Order.

The Federal Sustained-Yield Forest Management Act (sustained-yield act) was passed on March 29, 1944. 58 Stat. 132, 16 U.S.C. §§ 583-583i. The stated purpose of this act was

> to promote the stability of forest industries, of employment, of communities, and of taxable forest wealth, through continuous supplies of timber; * * * to provide for a continuous and ample supply of forest products; and * * * to secure the benefits of forests in maintenance of water supply, regulation of stream flow, prevention of soil erosion, amelioration of climate, and preservation of wild life.

(16 U.S.C. § 583). 16 U.S.C. § 583(b) provides for the establishment of sustained-yield units:

> The Secretary of Agriculture and the Secretary of the Interior are further severally authorized, whenever in their respective judgments the maintenance of a stable community or communities is primarily dependent upon the sale of timber or other forest products from federally owned or administered forest land and such maintenance cannot effectively be secured by following the usual procedure in selling such timber or other forest products, to establish by formal declaration for the purpose of maintaining the stability of such community or communities a sustained-yield unit consisting of forest land under the jurisdiction of the Secretary establishing such unit, to determine and define the boundaries of the community or communities for whose benefit such unit is created, and to sell, subject to such conditions and requirements as the Secretary believes necessary, federally owned or administered timber and other forest products from such unit without competitive bidding at prices not less than their appraised values, to responsible purchasers within such community or communities.

16 U.S.C. § 583(f) defines "federally owned or administered forest land" to mean

> forest land in which, or in the natural resources of which, the United States has a legal or equitable interest of any character sufficient to entitle the United States to control the management or disposition of the timber or other forest products thereon, except land heretofore or hereafter reserved or withdrawn for purposes which are inconsistent with the exercise of the authority conferred by this Act * * *; and shall include trust or restricted Indian land, whether tribal or allotted, except that such land shall not be included without the consent of the Indians concerned.

Pursuant to the sustained-yield act, the Grays Harbor Federal Sustained Yield Unit (unit) was established by the Chief of the Forest Service, U.S. Department of Agriculture (USFS), on November 2, 1949. The unit is administered by USFS pursuant to a written policy statement which was originally issued in November 1949, and has been amended on several occasions. The policy statement was last revised on June 7, 1987. Under this policy statement, timber and forest products sold from the unit are required to be given at least primary manufacture 1/ within the Grays Harbor

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1/ Section III of the policy statement provides:

"The term 'primary manufacture' as used herein shall be considered to have been accomplished when, as a minimum:

"A. In sawmills, logs have been cut into rough green lumber containing the various dimensions of lumber usually produced by mills of comparable size in the sawmill industry of western Washington.

"B. In veneer or plywood plants, logs, bolts, or veneer blocks have

Area. 2/ This requirement is intended to fulfill the sustained-yield act's goal of promoting the stability of local communities dependent upon forestry industries. Section II of the policy statement provides:

> Any purchaser of National Forest timber from the Unit who is unable to find a market or receive a fair price within the Grays Harbor Area for any raw forest products requiring primary manufacture removed from National Forest lands may, upon establishing this fact to the satisfaction of the Regional Forester, [USFS,] receive special authorization to market such products elsewhere.

In addition, section IV of the policy statement provides that USFS may exempt up to 50 percent of the annual harvest from the requirement for primary manufacture within the Grays Harbor Area. USFS retained discretion to reduce the amount exempted in order to accomplish unit objectives. Under this authority, the amount of harvest exempted from the primary manufacture requirement has been reduced to zero.

Public Law 100-638, 102 Stat. 3327 (P.L. 100-638), was enacted on November 8, 1988. P.L. 100-638 was intended primarily to provide a means through which the Quinault Indian Nation (Tribe) could begin to remedy some of the problems on the reservation resulting from the allotment process. Section 1 of P.L. 100-638 expanded the reservation by transferring approximately 11, 905 acres of land from United States ownership with administration by USFS to United States ownership in trust for the Tribe with administration by the Department of the Interior (section 1 lands). In addition, section 2 of the act required USFS to continue to administer an additional 5,460 acres of land, but to transfer 45 percent of the income generated from those lands to the Secretary of the Interior (section 2 lands). Income generated from both section 1 and section 2 lands was to be made available to the Tribe for four specified purposes. 3/

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fn. 1 (continued)
been converted to rough green veneer.

"C. In wood chipping plants, round-wood products, logging residues, or plant by-products have been made into chips of any merchantable grade.

"D. In shingle mills, logs or bolts have been manufactured into shingles or shakes of any marketable grade.

"E. In other raw forest products processing plants, the forest material has been manufactured to a point comparable in a degree of refinement to those stipulated above.

"Special products, such as poles, piling, or spars will be excluded from the primary manufacturing stipulations."

2/ The Grays Harbor Area is defined in section II of the policy statement. The Grays Harbor Area appears to have different boundaries than the unit.

3/ Section 4(b)(1) of P.L. 100-638 provides that

"moneys received from the lands referred to in Section 2 shall be distributed in the following manner:

Draft operating instructions for timber sales from the section 1 lands were issued by the Area Director on January 12, 1990. Interested parties were given until February 16, 1990, to file comments. The comments were analyzed and some changes were made to the draft. On March 9, 1990, the Area Director approved the operating instructions as revised in response to the public comments and informed interested parties that his approval could be appealed to this Board.

The Board received the two appeals identified, supra. Briefs were filed by appellants, the Area Director, and the Tribe.

Discussion and Conclusions

Appellants raise multiple objections to the operating instructions, most of which resolve into their primary argument that section 5(b)(2) of P.L. 100-638 requires BIA to administer timber sales from the section 1 lands in exactly the same way the USFS had been administering them, and is administering other lands remaining within the unit. Section 5(b)(2) states:

> In addition to restrictions referred to in subsection (a), the Secretary of the Interior shall--
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> * * * * * *
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> (2) Administer all timber and forest products sold from the lands referred to in section 1 in accordance with the conditions of the Policy Statement for the Grays Harbor sustained yield unit as defined and administered by the Secretary of Agriculture as long as such policy statement remains in effect.

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fn. 3 (continued)

"(1) forty-five percent of all moneys received during any fiscal year from said land shall be paid into the accounts referred to in Section 8."

Other provisions of section 4(b)(1) are not relevant here.

Section 8 provides:

"The secretary of the Interior shall maintain a segregated account and shall deposit in such account all funds derived from the sale of unprocessed timber from the lands referred to in Section 1. The Secretary shall make such funds available only for--

"(a) costs incurred by the Quinault Indian Nation for the preparation and administration of timber sales, including road construction and maintenance on such lands;

"(b) the mitigation of any adverse environmental impacts from timber harvest activities on such lands;

"(c) reforestation of any lands referred to in Section 1 or any other lands within the external boundaries of the Quinault Indian Reservation: Provided, That nothing herein shall allow the Secretary of the Interior to substitute these funds for other appropriated funds or for Forest Management Deductions funds presently available for reforestation; or

"(d) the purchase from willing sellers by the Quinault Indian Nation of any lands or interests in lands within the external boundaries of the Quinault Indian Reservation and any costs incurred by the Quinault Indian Nation incident thereto."

The issue involved is whether BIA, as the delegate of the Secretary of the Interior, has authority to define "fair price" in a way that differs from the definition used by USFS. A determination of fair price is required under section II of the USFS policy statement, which was quoted supra.

Under current procedures, USFS determines fair price when a purchaser of unprocessed timber from the unit requests authority to sell the timber to a mill outside the Grays Harbor Area. The timber purchaser is required to complete a form entitled "United States Department of Agriculture, Forest Service, Olympic National Forest, Application for authorization to sell logs from Grays Harbor Federal Sustained Yield Unit to processors outside primary area as defined below." Column I of the form, to be completed by the log owner, provides: "We have the following logs for sale which were produced within the [Grays Harbor] Federal Sustained Yield Unit under Forest Service Contract No.____ Bearing the Brand____ and have been offered the indicated prices from processors outside the primary area. Prices are F.O.B. _____."

Column II of the USFS form requires USFS to determine the fair price for the logs. USFS makes this determination through the "residual value" method of appraisal. This appraisal method is described in the May 1990 General Accounting Office report GAO/RCED-90-135, Federal Timber Sales: Process for Appraising Timber Offered for Sale Needs to be Improved (GAO Report):

> The premise behind the residual value appraisal method is that standing timber should be advertised at a price that enables a purchaser to (1) harvest the timber, (2) process it into finished products, and (3) sell those finished products at prices that recover all of the purchaser's harvesting and manufacturing costs and that also allow a margin for profit and risk.
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> In calculating the price for standing timber, the agency starts with an average price for the finished products that can reasonably be expected to be produced from the timber in the sale. These products include primary products such as lumber and plywood as well as byproducts such as wood chips used for pulp. From this price, the agency subtracts (1) the estimated costs of harvesting the timber and manufacturing it into finished products and (2) an allowance for profit and risk. What remains is the residual value, or appraised price.

(GAO Report at 11). At the time the GAO Report was written, the residual value appraisal method was used by USFS Regions 5 (Pacific Southwest), 6 (Pacific Northwest), and 10 (Alaska). 4/ The unit lies within USFS Region 6.

4/ The GAO Report states that USFS Regions 8 (Southern) and 9 (Eastern) have used the "transaction evidence" appraisal method since the 1970's, and that Regions 1 (Northern), 2 (Rocky Mountain), 3 (Southwestern), and 4 (Intermountain), and the Oregon State Office of the Bureau of Land Management, have switched from the residual value method to the transaction

The last column on the USFS form is completed by the mill within the Grays Harbor Area and provides an opportunity for the mill to state that it will match the fair price determined by USFS. The fair price determined by USFS may be significantly lower than the price offered by processors outside the Grays Harbor Area, resulting in a sale to a mill within the Grays Harbor Area at that significantly lower price.

The operating instructions approved by the Area Director provide in section III:

III. Limits of Zone of Primary Manufacture.

All timber and forest products sold from P.L. 100-638 Section 1. lands except as otherwise provided will be required to be given at least primary manufacture within the Grays Harbor Federal Sustained Yield Unit or the portion of the Grays Harbor County which has been defined as the Grays Harbor Area.

Any purchaser of timber from Section 1. lands, who is unable to find a market or receive a fair price within the Grays Harbor Area for any raw forest products requiring primary manufacture removed from the Section 1. lands may, upon establishing this fact to the satisfaction of the Bureau of Indian Affairs, receive special authorization to market such products elsewhere.

The Bureau of Indian Affairs shall make a determination about whether a timber purchaser is able to find a market or receive a fair price for any raw forest products based on the following evidence provided by the timber purchaser. When a timber purchaser of timber sale which is not exempt from the requirements of the Grays Harbor Federal Sustained Yield Unit seeks to sell any forest product outside of the Grays Harbor Area, the timber purchaser must provide the following evidence and documentation:

1) A written formal request to sell a forest product outside of the Grays Harbor Area. * * *

2) Documentation of the timber purchaser's effort to market the forest product within the Grays Harbor Area. * * *

3) Documentation of the price the timber purchaser can receive by marketing the forest product outside of the Grays Harbor Area. The determination of a fair price shall be the value the timber purchaser is able to receive from a primary

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fn. 4 (continued)
evidence method since 1986. The transaction evidence appraisal method uses prior comparable timber sales to attempt to predict the price that new timber sales can reasonably be expected to bring. See GAO Report at 12-13.

> manufacturer outside of the Grays Harbor Area less any transportation or handling cost differential. The determination of a fair price from outside of the Grays Harbor Area is based on the principle of a willing seller and a willing buyer conducting business in an arms length transaction.
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> Upon receipt of a formal request by a timber purchaser to sell a forest product outside of the Grays Harbor Area, the Bureau of Indian Affairs shall determine the price for the particular specie(s) which primary manufacturers must meet. This will be the price offered outside of the area less transportation or handling costs. The Bureau of Indian Affairs will then notify the primary manufacturers who were originally offered the forest product within the Grays Harbor Area by certified mail and inform them of the request by the timber purchaser to sell outside of the Grays Harbor Area. * * * The primary manufacturers from the Grays Harbor Area will have ten (10) days to respond to the notification from the Bureau of Indian Affairs.
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> Upon failure to respond to the notification or failure to meet the fair price by the primary manufacturers within the Grays Harbor Area, the Bureau of Indian Affairs may then decide to allow the timber purchaser to sell the forest product outside of the Grays Harbor Area. * * *

On page 5 of an affidavit signed by the Supervisory Forester, Timber Sales, for the BIA Portland Area Office, which was attached to the Area Director's answer brief, the following procedure was described as being the procedure BIA uses for determining fair price:

> 53 BIAM Supp. 3, and its companion Portland Area Addendum establish the BIA's procedures for appraisal of Indian timber including use of transaction evidence, as determined by individual Area Directors. The Portland Area Addendum directs how transaction evidence appraisals will be implemented in the Portland Area. Pursuant to this authority, the use of transaction evidence appraisals has been performed on old growth Quinault Indian Reservation timber since 1978. The BIA's method of performing transaction evidence appraisals is to produce initially a residual value appraisal (similar to the USFS) for an historical reference point. This residual value appraisal is then adjusted to become the fair market value by lowering or raising stumpage rates as reflected by the current price paid for each species in the market area.

The Area Director stated that BIA adjusted the value determined under the residual value appraisal method by using evidence of comparable sales and transactions to bring the stumpage rates to current market time frames and values. He stated that this adjustment was necessary in order to fulfill BIA's statutory and trust responsibility obligations to the Tribe to receive fair market value for tribal timber. See, e.g., 25 CFR 163.6. The Area Director, as did the GAO Report, criticized the residual value method for

failing to appraise forest products at their fair market value. It was indicated that fair market value was only received under the residual value appraisal method when there was substantial competition for the forest product.

Before transfer, USFS administered the section 1 lands using the residual value appraisal method. As far as the Board has been informed, USFS Region 6 continues to use this appraisal method. 5/

Appellants argue that section 5(b)(2) of P.L. 100-638 is clear and unambiguous and requires BIA to administer the section 1 lands "in accordance with * * * the Policy Statement * * * as defined and administered by" USFS. Appellants contend that this section requires BIA to use the same appraisal method as is used by USFS, and in all other ways to administer the section 1 lands in exactly the same manner as USFS.

BIA and the Tribe contend that section 5(b)(2) must be read in the context of the entire statute. When thus read in context, they argue that the section requires BIA to conform to the "conditions" of the USFS policy statement, while incorporating BIA's trust responsibility obligations. Therefore, they argue, particular details of administration not specifically set forth in the policy statement can differ from the USFS manner of administration without violating section 5(b)(2).

The Board has carefully considered the language of section 5(b)(2) in its statutory context and finds that the section is ambiguous. Accordingly, the Board may examine legislative history in an attempt to resolve the ambiguity.

As originally introduced on August 10, 1988, S. 2752 and H.R. 5203 provided in section 4(b): "In addition to restrictions referred to in subsection (a), lands referred to in section 1 shall be administered in the same manner as lands which are subject to the restrictions of the Grays Harbor sustained yield unit administered by the Forest Service."

During committee hearings on the bills, the Tribe presented several proposed technical amendments. One proposal concerned section 4(b), and suggested a revision so that the, section would read: "In addition to restrictions referred to in subsection (a), lands referred to in Section 1 shall be subject to the restrictions on processing location applicable to the Grays Harbor Sustained Yield Unit administered by the Forest service." The Tribe explained:

5/ Footnote 3, at page 15 of the Area Director's answer brief states: "Forest Service regulations permit 'transaction evidence' appraisals. 36 CFR Section 223.60. Most regions have accordingly adopted this method. Apparently Region 6, Forest Service, need only request that it too be authorized use of 'transaction evidence' under Section 223.60."

> The primary concern of the Northwest Independent Forest Manufacturers (NIFM) and manufacturers located within Grays Harbor County is to ensure the status quo on export restrictions and processing location requirements are maintained. Both the existing language and our proposed language for subsection (b) can satisfy their concerns. The existing language, however, is unclear as to the intent behind words as to how the newly acquired lands can "be administered in the same manner" as lands of the Grays Harbor Federal Sustained Yield Unit.
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> Our concern is that the existing language could potentially create administrative conflict in the management of the restoration lands. On the one hand, the land is to be administered by the Secretary of Interior to fulfill Federal trust obligations and responsibilities. On the other hand, there is a possibility the existing language could be interpreted to imply that the Secretary's administration would be subject to policy decisions set forth by the United States Forest Service.

(Proposed Technical Amendments to S. 2752, Submitted by the Quinault Indian Nation to the Senate Select Committee on Indian Affairs, Sept. 12, 1988, at 1-2).

Amendments in the nature of substitutes were made to both bills by the committees, resulting in the present wording of section 5(b)(2), quoted supra.

The Board has reviewed the legislative history of P.L. 100-638 and finds little that helps to clarify precisely what was meant by the language in section 5(b)(2). It appears that Congress focused on the issue that was raised to it as being of primary concern to the NIFM, i.e., the limitations on the zone of primary manufacture. Thus, the House and the Senate reports and the floor debates refer to the exemption from the requirement for primary manufacture within the unit established by USFS in the policy statement. It is clear that Congress intended BIA to abide by USFS' determination of the amount of timber exempt from primary manufacture within the unit. The legislative history does not, however, offer guidance on how Congress viewed other matters of "administration."

Because the legislative history does not directly answer the question of whether Congress intended that BIA could change the method for determining fair price, congressional intent must be sought from other aspects of the act. Section 3 of P.L. 100-638 provides:

> (a) All right, title, and interest in lands owned by the United States and administered by the United States Forest Service and referred to in section 1, shall hereafter--
>
> (1) be administered by the Secretary of the Interior; and

(2) be held in trust by the United States for the Quinault Indian Nation and to be [sic] part of the Quinault Indian Reservation.

(b) All right, title, and interest in lands which are owned by the United States and administered by the United States Forest Service which are referred to in section 2 shall remain in the United States and, except as provided in section 4 [dealing with distribution of receipts from the lands], shall continue to be administered by the United States Forest Service [in] accordance with all laws, rules and regulations applicable to the national forests.

(c) The rights of the Quinault Indian Nation to revenues under subsection (b) of section 4 shall not affect the management of these lands nor create a trust or fiduciary duty on the Secretary of Agriculture with respect to such management beyond that which the Secretary may have under existing law.

Subsection (c) was added to section 3 during Senate floor debate at the request of the Department of Agriculture, which apparently feared that the legislation might require it to administer the section 2 lands as tribal trust property with concomitant trust responsibilities (S 15303, daily ed. Oct. 7, 1988).

[1] Both the Tribe and the Department of Agriculture specifically brought the trust responsibility aspects of administration of these lands to the attention of Congress. It is clear from the final language of the statute that Congress intended the section 1 lands to be administered as tribal trust property, and that it expressly distinguished this status from the status of section 2 lands. In recognizing this distinction, Congress must be presumed to have intended some differences in the manner in which the section 1 lands were administered. Any other interpretation would eviscerate the statute. Furthermore, this statute is subject to the long-standing rule of statutory construction that doubtful or ambiguous expressions in statutes enacted for the benefit of Indians must be interpreted in favor of the Indians. See, e.g., Bryan v. Itasca County, 426 U.S. 373 (1976); Squire v. Capoeman, 351 U.S. 1 (1956); Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1566-69 (l0th Cir.), dissenting opinion adopted as majority opinion, 782 F.2d 855 (10th Cir. 1984) (en banc), cert. denied, 479 U.S. 970 (1986); Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982); Mobil Oil Corp. v. Albaquerque Area Director, 18 IBIA 315, 97 I.D. 215 (1990); Kickapoo Tribe of Oklahoma v. Shawnee Agency Superintendent, 13 IBIA 339 (1985).

[2] The Board, therefore, holds that P.L. 100-638 imposes a trust responsibility on BIA in its management of the section 1 lands. Cf. United States v. Mitchell, 463 U.S. 206 (1983). Part of BIA's trust responsibility is to maximize, to the extent possible, revenues generated from trust lands. Cf. Kenai Oil & Gas, Inc. v. Department of the Interior, 671 F.2d 383, 386 (10th Cir. 1982). The record amply demonstrates that use of the residual

value method of appraisal would be unlikely to meet this trust responsibility because it does not ensure that a fair market value will be received for timber and other forest products. The Board declines to find that Congress intended in section 5(b)(2) to prevent BIA from employing an appraisal method that would result in a fair market value return for timber harvested from the section 1 lands. The Board thus holds that section 5(b)(2) does not require BIA to determine fair price through use of the same appraisal method as that used by USFS, when use of that appraisal method is not required by the USFS policy statement. 6/

However, BIA is required to determine fair price through a reasonable appraisal method, not by an ad hoc process. The appraisal procedure BIA describes in its brief does not appear to be the method for determining fair price set forth in the operating instructions. BIA's brief describes a procedure under which a residual value is first determined and then adjusted to present market conditions through the application of evidence of comparable recent transactions. The operating instructions state at two points that fair price is the price offered by a primary manufacturer outside the Grays Harbor Unit, less transportation or handling costs. They state at section III.3: "The determination of a fair price from outside the Grays Harbor Area is based on the principle of a willing seller and a willing buyer conducting business in an arms length transaction." Under the language of the operating instructions, fair price is the highest price a primary manufacturer outside the Grays Harbor Area will pay, less transportation or handling costs. The language of the operating instructions leaves no room for an objective appraisal by BIA such as is described in the Area Director's filings. Instead, it establishes a "whatever-the-outside-market-will-bear" price.

[3] Both the language and the legislative history of P.L. 100-638 clearly show that Congress was attempting to reconcile two competing and conflicting Federal policies: the trust responsibility to an Indian tribe and the principles established under the sustained-yield act. In attempting this reconciliation, Congress found that an injustice had been done to the Tribe when land was omitted from its reservation, but that the land most appropriate for alleviating that injustice had, for many years, been set aside for other Federal purposes and that persons within the Grays Harbor Area had made long-term commitments based upon a reasonable expectation that the unit would continue to exist. In dealing with these conflicting interests and goals, Congress reached a compromise under which it modified the trust responsibility normally owned to an Indian owner of trust or restricted land by retaining certain limitations established in the sustained-yield act, such as the prohibition of export and the requirement for local primary manufacture, which are not restrictions normally placed on Indian timber. In implementing the act, BIA must be cognizant of this inherent tension. While BIA must attempt to maximize the revenues generated

6/ It would be interesting to learn if appellants would challenge a USFS determination to switch to another appraisal method, such as the transaction evidence method, and, if so, on what grounds.

by this trust resource, it must do so within the framework--and the spirit--of the sustained-yield act. That framework envisions a fair opportunity for primary manufacturers within the Grays Harbor Area to complete the primary manufacture of forest products harvested within the unit, while ensuring that a fair price is received. In this regard, the appraisal methodology described in the Area Director's filing with the Board appears to provide a reasonable mechanism for determining a fair price in relation to present market conditions. However, the language of the operating instructions does not require, or even allow, the use of the methodology described. Instead, that language unreasonably violates the intent of the sustained-yield act by providing that the highest offer received from outside the Grays Harbor Area, minus transportation or handling expenses, is the fair price that primary manufacturers within the Grays Harbor Area must meet. As appellants allege, this is an exception that swallows the rule. The language of the operating instructions must be revised to clearly require the use of an appropriate appraisal method for determining fair price. 7/

Appellants also argue that fair price must be determined "within" the Grays Harbor Area. It appears that appellants contend that fair price must be determined only with reference to the price primary manufacturers "within" the Grays Harbor Area are willing to pay, and that BIA cannot use any evidence of what primary manufacturers outside the Grays Harbor Area may offer.

This argument is the exact converse of the present language of the operating instructions. The sustained-yield act contemplates that primary manufacturers within a sustained-yield unit will have the first chance at processing timber and forest products harvested within the unit, so long as they pay a fair price. It does not contemplate that those primary manufacturers are to be subsidized by the citizens of the United States--or, in this case, the Tribe--by allowing them to dictate the price at which the timber and forest products will be sold without any regard to the prevailing market conditions and fair market value. The Board rejects appellants' argument that the fair price must be based solely on what primary manufacturers within the Grays Harbor Area are willing to pay.

Appellant Dahlstrom Lumber Co. also appears to challenge BIA's approval of a timber sale agreement between the Tribe and the Quinault Land and

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7/ In applying any appraisal method that uses evidence of comparable sales to estimate present fair market value, BIA must be careful to exclude, or adjust for, sales on the export market. Export sale prices are historically higher than sale prices for the domestic market. Because P.L. 100-638, as does the sustained-yield act, limits sales to the domestic market, a fair price for sales from section 1 lands must relate to the fair market value on the domestic market.

If the Area Director actually believes that the language of the operating instructions sets out or requires the procedure described in his brief, the language still needs to be rewritten to remove the ambiguity created and identified here.

Timber Enterprise (QLTE) , a tribal enterprise organized and chartered by the Tribe in 1988. QLTE is an entity separate from the Tribe and was created for the purposes of consolidating land ownership interests on the reservation and creating an on-going profit center for forest products on the reservation. Under such a timber sale agreement, standing timber is sold to QLTE, which is then responsible for all aspects of timber harvesting and sale.

Appellant's argument against an initial sale to QLTE is not clear. It appears that appellant believes that the sale to QLTE somehow defeats the restrictions on primary manufacture within the Grays Harbor unit. An initial sale by the Tribe to QLTE merely changes the identity of the owner of the timber and forest products and of the person who is responsible for obtaining primary manufacture. Appellant has no interest in the identity of the person with whom it deals; its only interest is in ensuring that person follows the established rules concerning primary manufacture. A sale of standing timber to QLTE for logging and sale does not defeat the primary manufacture restriction.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Final Operating Instructions for the Sale of Timber Within the North Boundary Addition, Quinault Indian Reservation, approved by the Portland Area Director on March 9, 1990, are affirmed in part and vacated in part. This matter is remanded to the Area Director for revision of the operating instructions in accordance with this opinion.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge